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Human rights and transnational corporations and other business enterprises

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, submitted pursuant to Human Rights Council resolutions 17/4 and 35/7.

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Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises

Summary

In the report, the Working Group on the issue of human rights and transnational corporations and other business enterprises unpacks the concept of access to effective remedies under the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework. It clarifies the interrelationship between the right to effective remedy, access to effective remedy, access to justice and corporate accountability. It examines the issue of effective remedies from the perspective of rights holders and proposes that remedial mechanisms should be responsive to the diverse experiences and expectations of rights holders. Affected rights holders should be able to claim what may be termed a "bouquet of remedies" without fear of victimization.

The Working Group also outlines what may be termed as an "all roads to remedy" approach to realizing effective remedies, which implies that access to effective remedy is taken as a lens to guide all steps taken by States and businesses and that remedies for business-related human rights abuses are located in diverse settings. The report ends with specific recommendations to States, business enterprises, civil society organizations and human rights defenders.

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I. Introduction

A. Backdrop

1. In the present report, the Working Group on the issue of human rights and transnational corporations and other business enterprises sets out what an effective remedy means under the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework so as to ensure that rights holders are at the heart of remedies. The Working Group also outlines what may be termed as an "all roads to remedy" approach that should inform the action of all relevant stakeholders to realize effective remedies for those affected by business-related human rights abuses.

2. There is a close relationship between rights and remedies.[1] If a human right is breached, the holder or holders of the right should be able to seek remedies from the duty bearers. The remedies should be effective, lest rights mean little in practice. Accordingly, the "right to an effective remedy for harm is a core tenet of international human rights law".[2] Access to effective remedy is also a core component of the Guiding Principles. Guiding Principle 1 requires States to take "appropriate steps to prevent, investigate, punish and redress" business-related human rights abuses within their territory and/or jurisdiction. Guiding Principle 22 provides that, where "business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes". The foundational principle of pillar III, on access to remedy, Guiding Principle 25, reminds States to "take appropriate steps to ensure" that those affected by business-related human rights abuses within their territory and/or jurisdiction "have access to effective remedy".

3. Although several effectiveness criteria for non-judicial grievance mechanisms are stipulated in the Guiding Principles, there is no explanation of what amounts to an effective remedy. While there is a close correlation between the effectiveness of a remedial mechanism and obtaining an effective remedy,[3] these are two separate aspects, because an effective process may not always result in an effective outcome. Accordingly, there is scope to provide guidance on the concept of an effective remedy irrespective of the type of mechanism employed by rights holders to seek redress. The Working Group aims herein to provide such guidance.

4. National action plans are a key tool for the implementation of the Guiding Principles, including access to remedy provisions under pillar III. In its guidance on national action plans on business and human rights, the Working Group outlines potential measures that States can take to improve access to effective remedies.[4] It appears, however, that most of the existing plans do not contain adequate specific measures to remove well-documented barriers to access to remedies.[5] Consequently, States have thus far made little progress in providing effective remedial mechanisms to people adversely affected by business activities. Access to effective remedies, or

[1] Committee on the Rights of the Child, general comment No. 5 (2003) on general measures of implementation of the Convention, para. 24.

[2] A/HRC/32/19, para. 6.

[3] A/HRC/26/25, para. 41.

[4] See www.ohchr.org/Documents/Issues/Business/UNWG_NAPGuidance.pdf, pp. 31-36.

[5] For example, International Corporate Accountability Roundtable and European Coalition for Corporate Justice, "Assessments of existing national action plans on business and human rights" (November 2015: update), pp. 4-5.

rather the lack thereof, has been a common theme in all the country visits conducted by the Working Group to date.[6]

5. With a view to overcoming the challenges faced by victims in gaining access to effective remedies, in 2014 the Office of the United Nations High Commissioner for Human Rights launched the Accountability and Remedy Project.[7] The project has provided specific guidance to States in removing barriers to access to judicial remedies and in turn improving corporate accountability.[8] In a similar vein, in March 2016, the Council of Europe, in paragraph 31 of its recommendation CM/Rec(2016)3 on human rights and business, listed steps that member States should take to ensure that everyone had access to an effective remedy. In April 2017, the European Union Agency for Fundamental Rights outlined 21 specific recommendations to lower barriers for access to remedy at the European Union level.[9] The Working Group, in its report of June 2017, made recommendations on how to improve the effectiveness of cross-border cooperation between States with regard to law enforcement on the issue of business and human rights.[10]

B. Objectives

6. The Working Group seeks herein to achieve three interrelated objectives. First, it provides a brief clarification about the distinction between the "right to an effective remedy" and "access to an effective remedy" and discusses the relationship of these two concepts to access to justice and corporate accountability. This clarity should help in building a shared understanding around pillar III of the Guiding Principles.

7. Second, the Working Group invites stakeholders to give greater attention to the perspective of rights holders affected by business-related human rights abuses in construing what constitutes an effective remedy under the Guiding Principles. By keeping rights holders central to the entire remedy process, the Working Group proposes, in section III, elements that contribute to the effectiveness of remedies. The centrality of rights holders would, among other things, mean that remedial mechanisms are responsive to the diverse experiences and expectations of rights holders and that a bouquet of preventive, redressive and deterrent remedies is available to them.

8. Third, the Working Group outlines in section IV steps that States, businesses and civil society organizations should take to realize effective remedies for rights holders. The steps are proposed as part of the all roads to remedy approach. Access to effective remedy should be seen as an all-pervasive lens to inform all steps that States are expected to take as part of pillar I and businesses as part of pillar II.

C. Methodology

9. Given that the Guiding Principles are rooted in international human rights law, the Working Group draws on existing international human rights instruments and the work of treaty bodies and independent human rights experts. The topic of access to remedies has also received significant attention in decisions of regional human

[6] See www.ohchr.org/EN/Issues/Business/Pages/WGCountryVisits.aspx.
[7] See www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx.
[8] See A/HRC/32/19.
[9] European Union Agency for Fundamental Rights, *Improving Access to Remedy in the Area of Business and Human Rights at the EU Level: Opinion of the European Union Agency for Fundamental Rights* (Vienna, Publications Office of the European Union, 2017).
[10] A/HRC/35/33.

rights courts, research reports and scholarly commentaries.[11] The Working Group taps into these existing rich sources of information to unpack what an effective remedy means under the Guiding Principles.

10. In addition to relying on the above primary and secondary sources, the Working Group has been informed by the experiences of rights holders and of civil society organizations and human rights defenders, who work closely with the affected communities, in seeking effective remedies in relation to business enterprises. These experiences were gathered during country visits and from consultations held in Geneva, London, New Delhi, Ottawa, Phnom Penh and Seoul. The Working Group also collected feedback from States and other stakeholders through a questionnaire.[12] The present report is built on input received through all these processes.

D. Scope and limitations

11. What amounts to an effective remedy depends on several objective and subjective elements. The Working Group elaborates herein the concept of access to effective remedies under pillar III of the Guiding Principles, irrespective of whether remedies are sought from a judicial or non-judicial mechanism, from the perspective of rights holders. Because of word limits, it focuses only on women's experiences and expectations in terms of access to effective remedies. Nevertheless, similar attention should be paid to the diverse experiences and expectations of other groups, including children, indigenous peoples, migrant workers, ethnic minorities, persons with disabilities and people with different sexual orientation, who are often marginalized or made vulnerable as a result of discriminatory policies, processes and practices.

12. Various elements of reparation, outlined herein as part of what may be termed a "bouquet of remedies", need more extensive elaboration. Similarly, the all roads to remedy approach also requires further development in a variety of contexts. For example, the role of intergovernmental organizations and international financial institutions in providing access to effective remedies should be articulated.

II. Conceptual clarifications with regard to remedy, justice and accountability

13. Several terms are used in international human rights instruments and in literature on business and human rights: right to an effective remedy, access to effective remedy, access to justice and corporate accountability. The interrelationship between these terms is often unclear. Most international human rights instruments, including the Universal Declaration of Human Rights (art. 8) and the International Covenant on Civil and Political Rights (art. 2) acknowledge the

[11] For example, Dinah Shelton, *Remedies in International Human Rights Law* (Oxford, Oxford University Press, 2006); Gwynne Skinner, Robert McCorquodale and Olivier De Schutter, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business* (International Corporate Accountability Roundtable, CORE and European Coalition for Corporate Justice, 2013); Amnesty International, *Injustice Incorporated: Corporate Abuses and the Human Right to Remedy* (London, 2014); May Miller-Dawkins, Kate Macdonald and Shelley Marshall, "Beyond effectiveness criteria: the possibilities and limits of transnational non-judicial redress mechanisms" (2016); and Juan José Álvarez Rubio and Katerina Yiannibas, eds., *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union* (Abingdon, Routledge, 2017).

[12] See www.ohchr.org/EN/Issues/Business/Pages/ImplementationGP.aspx.

"right to an effective remedy", whereas some other international treaties mention "effective access to justice" (e.g., art. 13 of the Convention on the Rights of Persons with Disabilities). The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law mention both the right to a remedy and access to justice, with the latter seen as part of a victim's right to remedies.[13] The Guiding Principles and the Working Group's guidance contain references to both accountability and access to effective remedy, but without any explicit mention of the correlation between the two.

14. The right to an effective remedy is a human right with both procedural and substantive elements.[14] It imposes a duty on States to respect, protect and fulfil this right. It also entails responsibility for non-State actors, including businesses, as articulated in the Guiding Principles and elaborated in section IV of the present report. To realize the right to an effective remedy, access to appropriate remedial mechanisms should be provided by the bearers of a duty or responsibility concerning this right. It can thus be said that the concept of access to effective remedies is derived from, and dependent on, the right to an effective remedy.

15. Nevertheless, merely providing access to remedial mechanisms will not suffice: there should be an effective remedy in practice at the end of the process. This is why access to an effective remedy as having "both procedural and substantive aspects" is recognized in the Guiding Principles.[15] As duty bearers, States should, therefore, ensure that they put in place effective remedial mechanisms that can deliver effective remedies. Similarly, when a business enterprise provides remediation in cases in which it identifies that it has caused or contributed to adverse impacts, such remediation should be effective in terms of both process and outcome.

16. Access to justice, on the other hand, is a concept that is more elastic than the notions of the right to an effective remedy and access to an effective remedy. In a narrow sense, access to justice can be equated with the right or access to effective judicial remedies,[16] and in this sense effective remedies should often result in justice being provided to rights holders. Nevertheless, access to justice can also be used in a broader sense to deal with larger issues of injustice that may not be addressed through individualized remedies offered for a given set of human rights abuses, but would require more fundamental changes in social, political or economic structures.

17. The right (or access) to an effective remedy has a close relationship with the notion of corporate accountability. If remedies for human rights abuses are construed holistically, as articulated herein, to address "both individual and societal goals",[17] effective remedies should result in some form of corporate accountability. Conversely, corporate accountability should contribute to some form of remedies, which may or may not be effective. The starting point should therefore be to provide effective remedies to the victims of corporate human rights abuses, which in turn should inevitably result in corporate accountability.

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[13] The Basic Principles are set out in the annex to General Assembly resolution 60/147. See para. 11.

[14] See, for example, article 6 of the Convention on the Elimination of All Forms of Racial Discrimination and resolution 60/147, annex.

[15] See the commentary to Guiding Principle 25.

[16] Francesco Francioni, ed., "The rights of access to justice under customary international law", in *Access to Justice as a Human Right* (New York and Oxford, Oxford University Press, 2007), pp. 3-4.

[17] A/HRC/14/22, para. 12.

III. Centrality of rights holders in access to effective remedies

18. Human rights instruments, treaty bodies, experts and courts have developed elements to provide general guidance about what constitutes an effective remedy under international human rights law.[18] These elements are also relevant to understanding access to effective remedies under the Guiding Principles.

19. Building on this existing corpus of guidance, the Working Group develops herein an overarching idea that rights holders should be central to the entire remedy process, including to the question of effectiveness. It is they who suffer harm owing to business-related human rights abuses. Any process to remedy such harm should therefore take both the rights holders and their suffering seriously, lest remedies not be regarded as effective by those whose opinion should matter the most.

20. The centrality of rights holders in access to effective remedies will entail several requirements, the first four of which are developed more fully below, while the other five are merely flagged owing to word limits. Many of these requirements can be linked, explicitly or implicitly, to the effectiveness criteria set out in Guiding Principle 31.[19] First, remedial mechanisms and remedies should be responsive to the diverse experiences and expectations of rights holders.[20] Human rights are best advanced when the "experiences, perspectives, interests, and opinions [of the rights holders] deeply inform how remedy mechanisms are created and implemented".[21] Second, the key constitutive element of effectiveness, such as remedies being accessible, affordable, adequate and timely, should be determined with reference to the needs of rights holders seeking justice. Third, the affected rights holders should have no fear of victimization in the process of seeking remedies.[22] Fourth, as noted in the commentary to Guiding Principle 25, a range of remedies should be available to rights holders affected by business-related human rights abuses.

21. Fifth, remedial mechanisms, whether judicial or non-judicial, should not treat rights holders merely as recipients of remedy. Rather, all mechanisms should be at the service of rights holders, who should be consulted meaningfully in creating, designing, reforming and operating such mechanisms. Such engagement would ensure that remedial mechanisms and their processes are geared towards protecting and redressing the rights of communities affected by business-related human rights abuses.

22. Sixth, the effectiveness of a remedy should be judged also from the perspective of affected rights holders. It is "important to understand what those affected would view as an effective remedy".[23] At the same time, it is possible that rights holders may develop low expectations as to the meaning of effective remedies because of social, economic and cultural conditions, the presence of barriers in gaining access to remedies, the lack of adequate or objective information, and other

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[18] See, for example, the Basic Principles and Human Rights Committee, general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant.

[19] The Corporate Human Rights Benchmark also incorporates some of these elements for ranking corporations, for example measurement themes B.1.8, C.3, C.5 and F.C.4. See www.corporatebenchmark.org/sites/default/files/2017-03/CHRB_methodology_singles.pdf.

[20] Human Rights Committee, general comment No. 31, para. 15.

[21] Columbia Law School Human Rights Clinic and Harvard Law School International Human Rights Clinic, "Righting wrongs?: Barrick Gold's remedy mechanism for sexual violence in Papua New Guinea — key concerns and lessons learned" (2015), p. 44.

[22] Commentary to Guiding Principle 31 (b); A/HRC/32/19, annex, para. 7.1.

[23] "OHCHR response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector", 12 June 2017, p. 13. Available from www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf.

power imbalances.[24] On the other hand, some affected communities may have unreasonable expectations of remedies. The effectiveness of remedies obtained should therefore be determined also with reference to an objective perspective of informed and empowered remedy seekers.

23. Seventh, if there is a power imbalance between the affected rights holders and a given enterprise facing allegations of human rights abuses,[25] persons administering a remedial mechanism should take proactive measures to redress this asymmetrical relationship.[26] This may involve relying on independent third parties, including civil society organizations or lawyers, to advise the rights holders and assist the mechanism in dealing with the complaint effectively.

24. Eighth, rights holders should have access to information about their rights, the duties of States and the responsibilities of businesses in relation to those rights, all available remedial mechanisms and trade-offs between mechanisms.[27] Such information, which should also partially address the power imbalance noted above, should be provided by the relevant States and business enterprises. Globally connected civil society organizations can also play a useful role in filling gaps in the flow or dissemination of information.

25. Ninth, access to effective remedies should be available without discrimination.[28] This duty is not merely negative in nature: rather, States should take appropriate affirmative action to provide access to effective remedies to marginalized or vulnerable groups.[29] In cases in which businesses have a responsibility to provide remediation through operational-level grievance mechanisms under the Guiding Principles, even they should consider adopting special measures to enable vulnerable people to have effective access to such mechanisms.

A. Sensitivity to diverse experiences of rights holders

26. Rights holders are not a homogenous group. Different groups of rights holders, in particular those living in vulnerable or marginalized situations, experience the impacts of business-related human rights abuses differently and may have varied expectations with regard to remedying the harm suffered.[30] These groups also face additional barriers in seeking access to effective remedies. States and business enterprises should therefore be sensitive to this diversity among rights holders to be able to provide effective remedies to all.[31]

27. Indigenous peoples, for example, have a special relationship with their ancestral land. Consequently, unlike other land owners, they may not find

[24] Benjamin Thompson, "Determining criteria to evaluate outcomes of businesses' provision of remedy: applying a human rights-based approach", *Business and Human Rights Journal*, vol. 2, No. 1 (Cambridge University Press, 2017), pp. 61-62.

[25] A/HRC/26/25, para. 37.

[26] See the commentary to Guiding Principle 31 (d).

[27] See Guiding Principles 31 (c) and 31 (d); Basic Principles, para. 11 (c).

[28] Castan Centre for Human Rights Law, Office of the United Nations High Commissioner for Human Rights and United Nations Global Compact Office, *Human Rights Translated 2.0: A Business Reference Guide* (Monash University, 2016), pp. 16 and 75-77.

[29] European Union Agency for Fundamental Rights, *Improving Access to Remedy in the Area of Business and Human Rights at the European Union Level*, p. 8.

[30] The experiences of right holders may vary even within a group. For example, a child with a disability may have different experiences to children without a disability.

[31] Committee on Economic, Social and Cultural Rights, general comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, para. 8.

compensation or even an offer of alternative land an effective remedy for forced displacement. Similarly, children experience the adverse impact of business operations in uniquely different ways: unlike adult workers, children working in factories will miss out on education and may experience physical or sexual abuse without even realizing it.[32] The barriers experienced by children and their needs in terms of effective remedies too will differ from those of adults.[33]

28. The Working Group will take women as an illustrative group to show how their experiences and expectations should inform the provision of effective remedies in all types of remedial mechanisms, in line with the Guiding Principles. Women's experiences should be relevant in three interrelated ways: how corporate activities may affect women differently, including by reinforcing or exacerbating existing gender discrimination by adopting gender-neutral policies; what additional barriers women may face in gaining access to effective remedies to redress human rights abuses; and what remedial responses women may need to achieve substantive justice in an era in which the private sector is playing a dominant role.

29. Women are underrepresented on corporate boards and in managerial positions in business enterprises, including State-owned enterprises. They are often found in the most precarious working environments, for example at the bottom of supply chains or in informal operations. Pregnancy-related questions at interview or mandatory pregnancy testing before hiring are indicative of women's degrading experiences of business-related human rights abuses. Large-scale development projects also tend to affect women more adversely than men. Given that women "are disproportionately represented among the poor"[34] and may not own property, they would inevitably face a disadvantage in gaining access to loans to launch a new business. Accordingly, if a gender lens is not applied to impact assessment (social, environmental or human rights) and the affected women are not meaningfully and directly involved in informed consultation processes, both States and businesses may be unable to capture the unique adverse impacts of business activities on women.[35]

30. Women may also face additional barriers in gaining access to justice generally[36] and specifically in relation to corporate human rights abuses[37] because of discriminatory laws, gendered roles, economic marginalization, social stigma, power imbalances, religious values and cultural norms. Even if women do have access to remedial mechanisms, the dispute resolution process may lack gender sensitivity or compensation awarded may not reach them because of patriarchal social structures.

31. The above brief analysis shows how critical it is for both States and businesses to engage with women by applying a gender lens while implementing the Guiding Principles, including pillar III. For example, if businesses apply that lens in a cross-cutting manner, from making a policy commitment to carrying out all four stages of human rights due diligence and providing remediation, this should enable them not

[32] See Committee on the Rights of the Child, general comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights.

[33] Ibid., paras. 31 and 66-72.

[34] Guiding principles on extreme poverty and human rights (A/HRC/21/39), para. 23.

[35] See, for example, Amnesty International, "Out of sight, out of mind: gender, indigenous rights, and energy development in northeast British Columbia, Canada" (London, 2016); and "Gendered impacts: indigenous women and resource extraction — Kairos symposium executive summary", available from www.kairoscanada.org/wp-content/uploads/2015/05/KAIROS_ExecutiveSummary_GenderedImpacts.pdf.

[36] Committee on the Elimination of Discrimination against Women, general recommendation No. 33 (2015) on women's access to justice, paras. 3, 8-10 and 13.

[37] Miller-Dawkins, Macdonald and Marshall, "Beyond effectiveness criteria", pp. 27-28.

only to understand better the impact of their operations on women but also to find ways to deal with discriminatory structural barriers experienced by women.[38]

B. Accessible, affordable, adequate and timely remedies

32. It is generally accepted that remedies, to be effective, should be accessible, affordable, adequate and timely.[39] It is stressed in the Guiding Principles that all non-judicial grievance mechanisms should be "accessible" in a holistic sense, and the Working Group's guidance contains suggested ways to achieve this goal.[40] It is vital to construe these elements from the perspective of affected rights holders seeking remedies. For example, rights holders would consider a remedy to be accessible only if they know about its existence and could gain access to it without too much expense, inconvenience or the help of technical experts. Similarly, what may be regarded as an affordable remedy from a purely objective perspective might not be considered affordable by the actual affected communities.

33. Adequacy of remedies has several elements. If the remedy involves compensation, adequacy may be determined with reference to the quantum of compensation. This should generally work, but not always. For example, if a farmer's land is acquired for a development project, monetary compensation may not offer a perpetual source of livelihood and thus might not be regarded as an adequate remedy. The adequacy of remedies should also be judged by keeping in mind not only the current needs of the victims, but also their future long-term needs. Although the finality of agreed remedies is a legitimate goal, there should be some built-in flexibility to respond to harm discovered after the conclusion of compensation agreements.

34. To be effective, remedies should also be timely,[41] given that justice delayed is often justice denied. What is timely will depend on, among other things, the complexity of a case, any transnational dimension, the number of affected people, the nature of the abuse, the type of remedy sought and the capacity of a given remedial mechanism. Nevertheless, what rights holders regard as timely should be an important consideration. For example, a person who is terminally ill as a result of exposure to hazardous substances or a single working mother who is wrongfully dismissed but has no alternative means to support her family would expect remedies more swiftly than other affected persons.

C. Freedom from fear of victimization in seeking remedies

35. If rights holders fear victimization in the process of seeking remedies for a human rights abuse, they may not be able to avail themselves of remedies in practice, even if those remedies appear to be effective on paper.[42] The victimization may take many forms. Rights holders, including social activists and human rights defenders, may face intimidation, arrest, arbitrary detention, criminal defamation

[38] The Landesa case study of February 2017 about the Kilombero Sugar Company in the United Republic of Tanzania shows how vital gender sensitivity is for land-use planning, communication with affected women and equitable distribution of the benefits of sugar production. See www.landesa.org/wp-content/uploads/KSCL-Tanzania-Case-Study-FINAL.pdf.

[39] Basic Principles, para. 2 (c); Committee on Economic, Social and Cultural Rights, general comment No. 9 (1998) on the domestic application of the Covenant, para. 9.

[40] A/HRC/32/19, annex, paras. 15-16.

[41] A/HRC/26/25, para. 44.

[42] A/71/281, para. 51.

charges, enforced disappearance or even murder.[43] Rights holders seeking remedies may also be subject to a strategic lawsuit against public participation.[44] In 450 cases of attacks against human rights defenders tracked by the Business & Human Rights Resource Centre, judicial harassment has emerged as the most common tool of suppression (40 per cent of cases).[45]

36. Freedom from fear of victimization in seeking remedies is an integral component of access to effective remedies, because no additional harm should be caused in the process of redressing the initial harm. States should therefore ensure that people and communities adversely affected by business activities face no inhibition in approaching remedial mechanisms.[46] Business enterprises should also play their part in cooperating with such efforts by States, including by ensuring that their action to defend corporate interests does not have "a chilling effect on the legitimate exercise of ... remedies" by affected people.[47]

37. It is notable that, in paragraph 66 of the 2017 edition of the International Labour Organization Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, there is recognition that "any worker who, acting individually or jointly with other workers, considers that he or she has grounds for a grievance should have the right to submit such grievance without suffering any prejudice whatsoever as a result". Future business and human rights frameworks, including national action plans to implement the Guiding Principles, should contain explicit recognition of a commitment to protect rights holders seeking remedies from victimization.

D. Bouquet of remedies

38. Rights holders affected by business-related human rights abuses should be able to seek, obtain and enforce a bouquet of remedies: a range of remedies depending upon varied circumstances, including the nature of the abuses and the personal preferences of rights holders. There are at least two key reasons why multiple remedies should be concurrently available to the affected persons and communities.

39. First, if the aim of remedies is "to place an aggrieved party in the same position as he or she would have been had no injury occurred",[48] the injury experienced by the rights holders may not be recoupable by any one remedy. In the commentary to Guiding Principle 25, it is noted that remedy "may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition". Different remedies may be more effective in different situations.

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[43] For attacks against human rights defenders, see A/71/181, A/HRC/34/52 and www.business-humanrights.org/en/key-findings-from-the-database-of-attacks-on-human-rights-defenders-feb-2017. The killing of Berta Cáceres for defending the rights of indigenous peoples and the prosecution of Andy Hall for exposing business-related labour rights abuses are emblematic cases in this area.

[44] Ciara Dowd and Elodie Aba, "Why it's getting harder (and more dangerous) to hold companies accountable", 23 May 2017. Available from www.opendemocracy.net/openglobalrights/ciara-dowd-elodie-aba/why-it-s-getting-harder-and-more-dangerous-to-hold-companies-. On a positive note, some states or provinces in Australia, Canada and the United States of America have enacted legislation against strategic lawsuits against public participation.

[45] See https://business-humanrights.org/sites/default/files/documents/CLA_AB_Final_Apr%202017.pdf.

[46] Basic Principles, para. 10.

[47] Committee on Economic, Social and Cultural Rights, general comment No. 24, para. 44.

[48] Dinah Shelton, *Remedies in International Human Rights Law*, p. 10.

The ability of rights holders to choose and obtain a bouquet of remedies depending upon the unique circumstances of each case will therefore be a vital precondition for access to effective remedies.

40. Second, remedies for human rights abuses serve interrelated purposes under international human rights law,[49] not least because such abuses involve harm to affected individuals and collective societal interests. Remedies should, of course, be able to redress, insofar as possible, the harm caused by some business activities. Nevertheless, remedies also have a key role to play in pre-empting future abuses. Lastly, remedies should be able to discourage not only a given actor, but also others, from committing the same or similar abuses in the future. The idea of effective remedies should therefore combine preventive, redressive and deterrent elements. There is a vital interrelationship between these elements.[50] If effective preventive remedies are available, there should be little need to seek redressive remedies. Similarly, deterrent remedies will reduce the need to seek preventive and redressive remedies. Consequently, if any one of these elements is missing, it will undermine the overall effectiveness of remedies.

41. It is, however, likely that not all remedial mechanisms conceived in the Guiding Principles will be able to offer all three elements. Whereas State-based judicial mechanisms should be able to provide preventive, redressive and deterrent remedies, State-based non-judicial mechanisms and non-State-based grievance mechanisms may be able to offer only preventive and/or redressive remedies. For the overall efficacy of remedies within a State, it should suffice if all three elements are available to be employed.

42. The Inter-American Court of Human Rights has developed the concept of "full restitution", wherever possible, as reparation for damage caused by a breach of international human rights obligations.[51] It has ordered innovative remedies, including amending or repealing laws incompatible with the American Convention on Human Rights, apologizing publicly, memorializing victims through monuments and street names and paying for victims' schooling.[52] In the Basic Principles emphasis is laid on the need for "full and effective reparation" of the following five forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[53] Although these conceptions of remedies have been developed in different contexts, they provide a useful reference point to understand what would constitute an effective, including rights-compatible, remedy under the Guiding Principles.

1. Restitution

43. The aim of restitutionary remedies is to avoid unjust enrichment and restore the affected rights holders to the original position before the abuses occurred.[54] This may mean "to take something from the wrongdoer to which the victim is entitled and restore it to the victim".[55] In the context of business-related human rights abuses, this may take several forms: if a woman was dismissed from her job or denied a promotion because of her pregnancy, she should be reinstated or promoted to the position that she deserved; if an enterprise caused pollution, it should be required to restore the environment as part of the "polluter pays" principle.

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[49] Ibid., pp. 10-16.

[50] Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (Abingdon, Routledge, 2012), pp. 47-50.

[51] Jo Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge, Cambridge University Press, 2003), pp. 239-240.

[52] Ibid., pp. 289-290.

[53] Para. 18. See also Human Rights Committee, general comment No. 31, para. 16.

[54] Basic Principles, para. 19.

[55] Dinah Shelton, *Remedies in International Human Rights Law*, p. 272.

44. Where restitution is sought by the victims of corporate human rights abuses and is feasible, this may provide a more effective remedy than compensation or even the incarceration of wrongdoers.

2. Compensation

45. A review of cases profiled by the Business & Human Rights Resource Centre shows that compensation is the most commonly sought and granted remedy for business-related human rights abuses.[56] While compensation often results as part of a civil process, in some cases courts may also award compensation as part of a fine imposed in criminal proceedings.[57] Victims may also obtain compensation through some institutionalized non-State-based grievance mechanism or an ad hoc private settlement of the dispute. Irrespective of the setting, the compensation received by the rights holders affected by business-related human rights abuses should be fair and proportional to the gravity of the harm suffered and never offered in lieu of potential criminal liability. Compensation should be awarded, as appropriate, for both pecuniary and non-pecuniary harm. The body awarding compensation should ensure that the affected rights holders do not receive inadequate compensation owing to lack of information or power imbalance.

46. Private compensation agreements to remedy human rights abuses that may also amount to crimes often raise complex issues about the appropriateness of private justice to settle public wrongs.[58] The confidential nature of these settlements reached between businesses and affected communities adds further complexity to the issue, especially because of information asymmetries and power imbalances between parties. While confidentiality may have both advantages and disadvantages, it is vital that confidentiality facilitate rather than undermine access to effective remedies. At least three considerations should be relevant here. First, the affected persons and communities should be provided with adequate and objective information about all aspects of the agreements, including the implications of confidentiality and legal waiver, if any. Such access to information should enable the affected people to take informed decisions. Second, in cases in which an agreement is signed by a representative on behalf of an affected community, confidentiality should not prevent the flow of information within the community about the process and the content of the agreement. Third, even if a settlement agreement is generally confidential, its non-sensitive parts should be released into the public domain to enable the dissemination of good practice as a reference point for subsequent agreements.

47. Compensation may also serve a deterrent purpose in appropriate cases pertaining to business-related human rights abuses. The Supreme Court of India, for example, has held that, if an enterprise is engaged in a hazardous or inherently dangerous industry, "the measure of compensation ... must be correlated to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect".[59] Similarly, if there is evidence of a business enterprise profiting from wilful, malicious, repeated or systematic human rights abuses, there may be a

[56] See https://business-humanrights.org/en/corporate-legal-accountability/case-profiles/complete-list-of-cases-profiled.

[57] It is suggested that the civil process to obtain compensation may also be embedded within criminal proceedings; European Union Agency for Fundamental Rights, *Improving Access to Remedy in the Area of Business and Human Rights at the European Union Level*, pp. 11-12.

[58] Francesco Francioni, ed., "The rights of access to justice under customary international law", in *Access to Justice as a Human Right*, pp. 4-5.

[59] See *M.C. Mehta v. Union of India, AIR*, 1987 SC 1086, 1099-1100.

case to award punitive or exemplary compensation to send a clear deterrent message.[60]

3. Rehabilitation

48. In addition to providing restitution and compensation to the rights holders affected by business-related human rights abuses, rehabilitation can be a vital remedy in many situations. For example, if people are displaced from their land because of an infrastructure project or the construction of a dam, only a provision for a suitable alternative piece of land may offer an effective remedy, because land can support livelihood for generations. On the other hand, a woman who suffered sexual violence linked to business operations may need psychological counselling and assistance to overcome trauma, and a worker injured in a factory may need vocational training to develop the skills required to take on another appropriate job. In such situations, the affected rights holders may need a range of rehabilitative care with independent oversight of overimplementation.

49. A holistic conception of rehabilitative remedies, which encompasses "all sets of processes and services ... to allow a victim of serious human rights violations to reconstruct his/her life plan or to reduce, as far as possible, the harm that has been suffered",[61] should be employed in the context of business-related human rights abuses. It is in this context that one can see the recommendation of the Committee on the Rights of the Child that "States should provide medical and psychological assistance, legal support and measures of rehabilitation to children who are victims of abuse and violence caused or contributed to by business actors".[62]

4. Satisfaction

50. Satisfaction can take multiple forms, from cessation of a continued human rights abuse to finding the truth, public apology and civil, administrative or criminal sanctions against the wrongdoers.[63] Giving direction to the State and/or a business enterprise to immediately stop alleged human rights abuses can be a powerful remedy. Moreover, a fact-finding inquiry to ascertain who caused human rights abuses (e.g., forced disappearance or killing of human rights activists) may assist in healing the emotional or psychological injury of the victims or survivors.

51. The rights holders affected by business-related human rights abuses often regard a genuine and meaningful public apology as a vital remedy to partly restore what cannot be compensated by money. Some business enterprises may hesitate to apologize, however, for fear that their having done so may subsequently be used to pursue legal claims. It may therefore be desirable to enact suitable apology laws that encourage businesses to offer meaningful apologies, but do not shield them from genuine legal action.

52. States should have effective judicial mechanisms in place to impose a range of sanctions against business enterprises as part of reparatory satisfaction. Sanctions may include fines, confiscation of assets, prosecution of corporate executives, suspension or termination of licences, exclusion from participating in public

[60] Dinah Shelton, *Remedies in International Human Rights Law*, pp. 356-358.

[61] Clara Sandoval Villalba, "Rehabilitation as a form of reparation under international law" (Redress Trust, London, 2009), p. 10.

[62] Committee on the Rights of the Child, general comment No. 16, para. 31.

[63] Basic Principles, para. 22.

procurement processes and community service orders.[64] It is also critical that States end impunity for corporate crimes by investigating and prosecuting offences.[65]

5. Guarantees of non-repetition

53. It is critical that States and business enterprises learn lessons from past instances of human rights abuses and take steps to avoid any replication of similar abuses at the same or other sites in future. Guarantees of non-repetition can be a useful forward-looking tool in this context, both in avoiding a repeat of specific abuses and in preventing business-related human rights abuses generally. These interrelated goals can be accomplished in diverse ways, such as by inserting appropriate clauses in business contracts or settlement agreements, raising awareness about integrating human rights norms into business operations, introducing compliance programmes, undertaking effective criminal prosecutions of perpetrators and introducing legal reforms to plug regulatory gaps. The Committee on the Rights of the Child has recommended that States "guarantee non-recurrence of abuse through, for example, reform of relevant law and policy and their application, including prosecution and sanction of the business actors concerned".[66]

6. Other preventive remedies

54. Except for guarantees of non-repetition, the above-mentioned forms of reparation are mostly redressive or deterrent in nature. As noted above, however, preventive remedies, which may be provisional or interim in nature, also have a critical role to play in the overall scheme of effective remedies. An injunction, for example, is a tool that could be used to pre-empt business-related human rights abuses if there is prima facie evidence of potential harm. If there is a legal basis, the rights holders should also be able to seek an order requiring a business enterprise to conduct a meaningful consultation with the affected community or conduct proper human rights due diligence. For example, a new French law requires some types of corporations to develop, disclose and implement a "vigilance plan", meaning that a person with locus standi may obtain an order requiring a corporation to establish the plan, ensure its publication and account for its effective implementation. Such a remedy should prevent business-related human rights abuses from occurring in the first place.

IV. All roads to remedy

55. Ensuring access to effective remedies for business-related human rights abuses will require transformative changes in laws, policies, remedial mechanisms, societal structures and global governance. A good starting point would be to remove well-known legal, practical, procedural and jurisdictional barriers to gaining access to judicial and non-judicial mechanisms. The guidance of the United Nations High Commissioner for Human Rights and the opinion of the European Union Agency for Fundamental Rights provide specific guidance to States on how to minimize barriers to access to judicial remedies. To implement the High Commissioner's guidance,

[64] Office of the United Nations High Commissioner for Human Rights (OHCHR), "Accountability and remedy project: illustrative examples for guidance to improve corporate accountability and access to judicial remedy for business-related human rights abuse", companion document to A/HRC/32/19 and Add.1, July 2016, pp. 20-21; European Union Agency for Fundamental Rights, *Improving Access to Remedy in the Area of Business and Human Rights at the European Union Level*, pp. 41-45.

[65] See A/HRC/35/33 and www.commercecrimehumanrights.org/wp-content/uploads/2016/10/CCHR-0929-Final.pdf.

[66] Committee on the Rights of the Child, general comment No. 16, para. 31.

States should develop "a comprehensive strategy ... as part of national action plans on business and human rights, and/or as part of strategies to improve access to justice generally".[67]

56. To complement these reform proposals, the Working Group outlines herein the all roads to remedy approach to realizing effective remedies for rights holders affected by business-related human rights abuses. Three components of the approach are discussed below: access to effective remedy should be taken as an all-pervasive lens; diverse actors should work individually and collectively towards the common goal of providing access to effective remedies; and remedies should be realized in diverse settings.

A. Access to effective remedy as an all-pervasive lens

57. There is a tendency to consider access to remedy as solely a pillar III issue. Nevertheless, considering that it is stated in the Guiding Principles that they are to be understood as "a coherent whole", access to effective remedies should be regarded as a common thread running through all three interconnected and interdependent pillars.[68] Whatever action is taken by States as part of pillar I and by business enterprises as part of pillar II would have some positive or negative bearing on access to effective remedies under pillar III. Accordingly, rather than being taken as an afterthought after pillars I and II fail to deliver, access to effective remedy should be treated as a lens that pervades all aspects of the business and human rights discourse.

58. A few examples can be given to illustrate how access to effective remedy as a lens would work in practice. When States set out, under Guiding Principle 2, "the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations", this should include what is expected of businesses in providing for or cooperating in remediation of adverse human rights impacts. States are also expected, under Guiding Principle 3, to ensure that corporate laws "do not constrain but enable business respect for human rights". A review and reform of corporate laws should, among other things, consider how to ensure that the principles of separate legal personality and limited liability do not pose undue barriers to gaining access to effective remedies. Similarly, when States seek to ensure policy coherence under Guiding Principles 8 to 10, they should not be oblivious of the impact of these issues — for example, of international investment agreements — on access to effective remedies.

59. Businesses too should consider access to effective remedy as a lens to discharge their responsibilities under pillar II. For example, the content of a policy commitment made by an enterprise under Guiding Principle 16, in addition to the four-stage process of human rights due diligence under Guiding Principles 17 to 21, should be conducive to facilitating access to effective remedies. Similarly, if an enterprise has put in place a grievance mechanism, the information about its working should be disclosed to stakeholders as part of pillar II communication, or under a statutory requirement such as the Modern Slavery Act (2015) in the United Kingdom of Great Britain and Northern Ireland. If the goal is to eradicate modern slavery from the entire supply chain, then ways and mechanisms to provide access to effective remedies should be an integral part of steps taken by business enterprises to achieve that goal. This may not yet be happening sufficiently. Of 60 companies analysed by KnowTheChain in 2016 about the transparency of their

[67] A/HRC/32/19, para. 31 (b).
[68] See Guiding Principles 1, 22 and 25.

efforts to eradicate forced labour from their global supply chains, only 7 have a process in place to respond to complaints.[69]

B. Role of diverse players

60. Realizing effective remedies in the field of business and human rights will require several key players to take concerted action. The Working Group discusses herein the role of three such players (States, business enterprises and civil society organizations/human rights defenders), although the all roads to remedy approach implies that every player in the business and human rights field should contribute to realizing effective remedies.

1. States

61. States have an obligation, under national law and international human rights law, to ensure that people and communities affected by business-related human rights abuses have access to effective remedies. This obligation is both individual and joint for two reasons. The first is normative: realizing human rights is a shared goal agreed upon by the international community and States have pledged to work together collaboratively to achieve it.[70] The second is practical: considering the current nature of globally interconnected business operations, including through supply chains, it will be difficult to provide effective remedies solely within strict territorial compartments.

62. In addition to removing barriers to access to effective remedies at the national level, States have a duty to cooperate and collaborate with their peers to plug gaps in victims' quests to seek effective remedies against business enterprises,[71] including State-owned or State-controlled enterprises. As the Working Group noted in its recent report, however, "to date, there has been little progress in cross-border cooperation that has led to successful law enforcement action in cases focused on business-related human rights abuses".[72] States should therefore do more to develop an institutionalized approach of cooperation and collaboration to deal with all business-related human rights abuses with a transnational dimension. Such an approach can take several forms, such as developing a regional or international framework[73] or negotiating bilateral mutual assistance agreements.[74] Close cooperation and coordination among States will not only fill remedy gaps in the event of corporate human rights abuses but also avoid a multiplicity of processes to seek remedies.

63. Remedies will often be more effective if they are offered closer to victims. States should therefore also take proactive measures to build the capacity of judicial and non-judicial mechanisms to impart effective remedies. Moreover, information and legal aid may be provided to affected communities to seek appropriate remedies.

64. As part of their extraterritorial obligation to respect, protect and fulfil human rights, States should provide access to effective remedies even to foreign victims in

[69] See https://knowthechain.org/wp-content/uploads/KTC_CrossSectoralFindings_Final.pdf, p. 23.

[70] See Articles 55 and 56 of the Charter of the United Nations.

[71] Skinner, McCorquodale and De Schutter, *The Third Pillar*, p. 26.

[72] A/HRC/35/33, para. 4.

[73] Committee on Economic, Social and Cultural Rights, general comment No. 24, para. 35.

[74] A/HRC/35/33, para. 93. The corporate social responsibility memorandum of understanding signed by Sweden with other States can be one of such vehicles of cooperation. See www.government.se/contentassets/822dc47952124734b60daf1865e39343/action-plan-for-business-and-human-rights.pdf, p. 21.

appropriate cases.[75] Doing so will be consistent with States signalling to enterprises "domiciled in their territory and/or jurisdiction" to "respect human rights throughout their operations".[76] The Committee on the Rights of the Child has noted that the obligations of States to protect the rights of children extend beyond their territorial boundaries.[77] This was recently reiterated by the Committee on Economic, Social and Cultural Rights.[78] States act extraterritorially in many areas within the parameters of international law and there are no sound reasons why they should hesitate to do so in the field of business and human rights. The Danish national action plan, for example, contains reference to the Government's commitment to actively promoting the discussion on extraterritorial regulation with a view to finding "joint solutions", encouraging the Council of Europe to take the lead on this matter.[79]

2. Business enterprises

65. Business enterprises have an independent but complementary role to play in realizing effective remedies. They have four remedy-related responsibilities flowing from pillars II and III of the Guiding Principles. First, a combined reading of Guiding Principles 11 and 12 makes it clear that all business enterprises have a responsibility to respect all "internationally recognized human rights". This includes the right to an effective remedy recognized in the Universal Declaration of Human Rights (art. 8) and the International Covenant on Civil and Political Rights (art. 2 (3)). In other words, businesses should not cause, contribute to or be directly linked to an adverse impact on the right to an effective remedy, that is, taking any action that "removes or reduces the ability of an individual to enjoy" this right.[80]

66. The responsibility to respect the right to an effective remedy should be kept in mind by business enterprises while putting in place policies (e.g., making a policy commitment to respect human rights under Guiding Principle 16) and processes (e.g., conducting human rights due diligence under Guiding Principles 17 to 21) appropriate to their size and circumstances. Doing so would allow businesses to use access to effective remedy as a lens to guide everything that they are expected to do under the Guiding Principles.

67. Second, where "business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes".[81] This responsibility is triggered only if an enterprise itself identifies that it has caused or contributed to an adverse human right impact. Such an identification may result "through its human rights due diligence process or other means".[82] The residual category of "other means" may include input received from stakeholders or through an operational-level grievance mechanism.[83] It may also include information that is part of complaints submitted to judicial or non-judicial remedial mechanisms.

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[75] European Union Agency for Fundamental Rights, *Improving Access to Remedy in the Area of Business and Human Rights at the European Union Level*, pp. 26-29.

[76] See Guiding Principle 2.

[77] Committee on the Rights of the Child, general comment No. 16, paras. 38-43.

[78] Committee on Economic, Social and Cultural Rights, general comment No. 24.

[79] See www.ohchr.org/Documents/Issues/Business/NationalPlans/Denmark_NationalPlanBHR.pdf, p. 15.

[80] OHCHR, "The corporate responsibility to respect human rights: an interpretive guide" (New York and Geneva, 2012), p. 15.

[81] See Guiding Principle 22.

[82] See the commentary to Guiding Principle 22.

[83] OHCHR, "The corporate responsibility to respect human rights", p. 63.

68. The responsibility of businesses to "cooperate" with "legitimate processes" to remedy adverse human rights impacts that they have caused or contributed to is also a key component of Guiding Principle 22, as affected communities seek remedies through a range of judicial or non-judicial grievance mechanisms. A recent addition to the existing options is company-union dialogue created under the 2017 edition of the International Labour Organization Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.[84] As part of their responsibility to respect human rights, business enterprises should, in good faith, not only participate in all such legitimate processes, but also comply with their remedial decisions. Attempts to limit the scope of existing remedies[85] or targeting affected communities with strategic lawsuits against public participation may also be regarded as inconsistent with the responsibility to "cooperate" with legitimate processes aimed at obtaining effective remedies.

69. If a business enterprise is merely "directly linked" to an adverse human rights impact through its operations, products or services by a business relationship, the enterprise itself is not required to provide for remediation, although it may take a role in doing so.[86] Nevertheless, the enterprise should still use its leverage to prevent and mitigate such an adverse impact.[87] In addition, as noted below, the responsibility of business enterprises to "establish or participate in effective operational-level grievance mechanisms" under Guiding Principle 29 is engaged in all types of adverse human rights impacts, including direct linkage impacts.

70. Third, if adverse human rights impacts may result in "irremediable" harm,[88] business enterprises should take proactive measures to prevent or mitigate such harm, rather than continuing business as usual with a mindset of subsequently paying compensation to redress the harm. This preventive remedial responsibility will be particularly relevant where, for example, exposure of workers to hazardous chemicals may result in irreversible health conditions, pollutants from a plant may destroy rare wildlife or industrial activities may have a significant impact on climate change.

71. Fourth, as indicated in Guiding Principle 29, "business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted". In addition to helping businesses to identify systematic human rights problems on the basis of an analysis of complaint patterns,[89] such mechanisms may allow grievances to be remediated early, harmoniously and cost-effectively. It is critical, however, that operational-level grievance mechanisms satisfy all effectiveness criteria stipulated in Guiding Principle 31 and never be used, directly or indirectly, to preclude access to other judicial or non-judicial remedial mechanisms,[90] lest they be unable to gain the trust of affected communities or provide effective remedies, thus undermining the very purpose of having such mechanisms.

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[84] See annex II and paras. 65-66 for further information.

[85] See, for example, the questions posed by John Ruggie regarding Shell's arguments in the *Kiobel* case. John G. Ruggie, "Kiobel and corporate social responsibility", issues brief (Cambridge, Massachusetts, John F. Kennedy School of Government at Harvard University, 2012), p. 6. Available from www.hks.harvard.edu/m-rcbg/CSRI/KIOBEL_AND_CORPORATE_SOCIAL_RESPONSIBILITY.pdf.

[86] See the commentary to Guiding Principle 22.

[87] See Guiding Principle 19.

[88] See Guiding Principle 24.

[89] See the commentary to Guiding Principle 29.

[90] Ibid.

3. Civil society organizations and human rights defenders

72. Civil society organizations and human rights defenders have a critical role to play in facilitating access to effective remedies. They are often "justice enablers" for the victims of corporate human rights abuses. They raise awareness of rights and available remedies, build the capacity of rights holders, address power imbalances, advocate pro-human rights reforms, contribute to human rights impact assessment processes, assist in documenting harm and collecting evidence, develop standards, highlight abuses, undertake fact-finding, provide counselling to victims, assist in litigation and monitor compliance with remedial orders. Their role becomes more critical when States are unwilling or unable to discharge their human rights obligations, including because of the alleged corporate capture of government agencies.

73. Considering the multifaceted role of civil society organizations and human rights defenders, States should safeguard the civic space of these actors[91] and treat them as critical allies in realizing human rights. As an example of good practice, the Government of Canada has developed new guidelines to protect human rights defenders.[92] The updated national action plan of the United Kingdom also records the Government's commitment "to promote protection of human rights defenders active on business and human rights related issues".[93] Nevertheless, merely defending human rights defenders may not be enough: States should also provide resources to civil society organizations and human rights defenders and build their capacity so that they can discharge their functions effectively and independently.

74. In addition to States, businesses should play their part in creating a safe operating environment for civil society organizations.[94] The reason is simple: in the absence of a meaningful contribution from civil society organizations and human rights defenders, business enterprises may struggle to "identify and assess any actual or potential adverse human rights impacts with which they may be involved".[95] Partnership with civil society organizations would also be critical for businesses to operate in weak governance zones. It appears that at least some corporations and business associations have begun to realize what may be termed the "moral-cum-market" hazards of remaining silent amid attacks on human rights defenders and begun to speak out against such persecution.[96]

C. Locating remedies in diverse settings

75. The all roads to remedy approach also means that effective remedies for business-related human rights abuses could be sought in diverse settings, including consumer courts, labour tribunals and environmental courts, and that the negative impact of other parallel regimes and processes, including dispute settlement under trade or investment agreements, on access to effective remedies under the Guiding

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[91] Committee on the Rights of the Child, general comment No. 16, para. 84.

[92] See http://international.gc.ca/world-monde/issues_development-enjeux_developpement/human_rights-droits_homme/rights_defenders_guide_defenseurs_droits.aspx?lang=eng.

[93] See www.gov.uk/government/uploads/system/uploads/attachment_data/file/522805/Good_Business_Implementing_the_UN_Guiding_Principles_on_Business_and_Human_Rights_updated_May_2016.pdf, p. 22.

[94] The Working Group aims to develop guidance about the responsibility of business in relation to human rights defenders. See www.ohchr.org/EN/Issues/Business/Pages/HRDefendersCivicSpace.aspx.

[95] See Guiding Principle 18.

[96] See, for example, the statement by Adidas, available from www.adidas-group.com/media/filer_public/f0/c5/f0c582a9-506d-4b12-85cf-bd4584f68574/adidas_group_and_human_rights_defenders_2016.pdf.

Principles is managed. The Working Group briefly considers the second situation to illustrate this point.

76. In the past two decades, thousands of investment agreements (mostly bilateral) have been negotiated. Their predominant focus on protecting investors' rights coupled with their insular investor-State dispute settlement process not only constrains the regulatory space available to a State to protect and fulfil the human rights of its people, but also limits the opportunities to seek effective remedies for business-related human rights abuses.[97] Investors, although not party to these agreements, are able to sue the relevant State to protect their commercial interests, but States or the affected communities cannot generally bring an action against an investor under these agreements for alleged human rights abuses linked to an investment project.

77. In line with Guiding Principle 9, steps should be taken to address this asymmetrical situation between the rights and obligations of investors.[98] States should conduct an inclusive and transparent human rights impact assessment before concluding trade-investment agreements and insert explicit substantive human rights provisions in those agreements to preserve adequate policy space to discharge their human rights obligations.[99]

78. A "reconfiguration" of investment agreements to impose explicit human rights obligations on investors, including an obligation to provide or participate in effective remedies for human rights abuses,[100] can take place in multiple ways. For example, States can require "that mechanisms for the settlement of investor-State disputes take human rights into account in the interpretation of investment treaties or of investment chapters in trade agreements".[101] Investment agreements may also contain a provision subjecting investors to legal action before courts in the host State for human rights abuses linked to the investment.[102] Moreover, it is possible to incorporate the "clean hands" doctrine into investment agreements: non-compliance with human rights provisions will disentitle the investor to claim benefits under an investment treaty.

V. Conclusions and recommendations

A. Conclusions

79. **The right to an effective remedy is a human right widely recognized under international human rights law and national laws. Access to effective remedies is a response to realize that right. Both concepts have procedural and substantive elements. Effectiveness of remedies concerns process as well as**

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[97] See http://ccsi.columbia.edu/files/2016/11/Workshop-on-International-Investment-and-the-Rights-of-Indigenous-Peoples-Outcome-Document-November-2016.pdf, pp. 6-9.

[98] See United Nations Conference on Trade and Development, "Investment policy framework for sustainable development" (2015) and www.cidse.org/publications/business-and-human-rights/business-and-human-rights-frameworks/ensuring-the-primacy-of-human-rights-in-trade-and-investment-policies.html.

[99] See, for example, the commitment made in the Swedish national action plan, available from www.government.se/4a84f5/contentassets/822dc47952124734b60daf1865e39343/action-plan-for-business-and-human-rights.pdf, p. 29.

[100] Barnali Choudhury, "Spinning straw into gold: incorporating the business and human rights agenda into international investment agreements", *University of Pennsylvania Journal of International Law*, vol. 38, No. 2 (2017), p. 425. See also *Urbaser S.A. v. Argentina*, ICSID case No. ARB/07/26.

[101] Committee on Economic, Social and Cultural Rights, general comment No. 24, para. 13.

[102] Draft model text for the Indian Bilateral Investment Treaty, art. 13.

outcome: the rights holders will not be satisfied without an effective remedy at the end of an effective remedial process. If remedial mechanisms consistently fail to offer effective remedies, they are likely to lose the trust of rights holders.

80. The concept of effective remedies is closely connected to the idea of corporate accountability. Effective remedies for business-related human rights abuses, taken in a holistic sense to fulfil individual and societal goals, should result in some form of corporate accountability and vice versa.

81. Rights holders should be central to the entire remedy process. Such centrality would, among other elements, mean that remedial mechanisms are responsive to the diverse experiences and expectations of rights holders; that remedies are accessible, affordable, adequate and timely from the perspective of those seeking them; that the affected rights holders are not victimized when seeking remedies; and that a bouquet of preventive, redressive and deterrent remedies is available for each business-related human rights abuse.

82. Unless States and businesses are sensitive to how different groups of rights holders, including women, experience adverse human rights impacts differently and may have unique remedial expectations, they will be unable to provide them with effective remedies.

83. Notwithstanding the awareness of well-documented barriers to access to effective remedies and the availability of specific guidance to overcome those barriers, the existing national action plans are generally very weak in terms of the implementation of pillar III. Obtaining effective remedies in the event of business-related human rights abuses therefore remains an exception rather than the rule.

84. In addition to generating political will, a fundamental shift towards the remedy pillar is required. The Working Group proposes the all roads to remedy approach: access to effective remedies, including preventive remedies, should be seen as an all-pervasive lens that should guide all action on the part of States and businesses under the Guiding Principles. Civil society organizations and human rights defenders too have a key role to play in realizing effective remedies. It is, however, rather worrying that the civic space for these players is shrinking almost everywhere.

85. The all roads to remedy approach also implies that remedies for business-related human rights abuses should be located in diverse settings. Investment agreements and their dispute settlement system are one clear candidate requiring changes to ensure that the rights of investors do not trump human rights.

B. Recommendations

86. The Working Group recommends that States:

(a) Maintain the centrality of right holders to the entire remedy process by ensuring that all remedial mechanisms are responsive to the diverse experiences and expectations of rights holders, especially marginalized or vulnerable groups;

(b) Apply a gender lens in implementing the Guiding Principles, including pillar III, to ensure that businesses do not perpetuate or exacerbate existing discrimination against women;

(c) Offer a bouquet of preventive, redressive and deterrent remedies to make good any harm caused to rights holders by business-related human rights

abuses and ensure that remedies are accessible, affordable, adequate and timely from the perspective of affected rights holders;

(d) Take proactive measures to address power imbalances between businesses and the affected rights holders, including by providing the latter with accessible information about their rights and remedial mechanisms;

(e) Avoid criminalizing peaceful protests and ensure that rights holders and human rights defenders are not victimized while seeking legitimate remedies;

(f) Pay attention to effective remedies when fulfilling the duty to protect human rights, which entails establishing effective judicial and non-judicial remedial mechanisms capable of providing effective remedies in practice;

(g) Independently assess national remedial mechanisms, pay greater attention to forward-looking action concerning pillar III in national action plans to implement the Guiding Principles and remove barriers to access to all types of remedy, including by following the High Commissioner's guidance and the recommendations made in the Working Group's reports;

(h) Cooperate and collaborate with other States to provide more effective remedies locally and extraterritorially for all business-related human rights abuses;

(i) Embed human rights explicitly in all trade or investment agreements to preserve regulatory space and require investors to comply with all applicable national and international human rights norms;

(j) Encourage businesses to establish effective operational-level grievance mechanisms to complement State-based judicial and non-judicial mechanisms;

(k) Create a conducive environment for civil society organizations working to enhance access to remedies and strengthen corporate accountability.

87. The Working Group recommends that business enterprises:

(a) Respect the right to an effective remedy by not taking action that would remove or reduce the ability of an individual or community to enjoy that right;

(b) Understand the concept of effective remedies in a broad sense to include a range of preventive, redressive and deterrent remedies, rather than merely payment of compensation;

(c) Keep the diverse experiences and expectations of different groups of rights holders in mind when providing access to effective remedies;

(d) Establish, in meaningful consultation with affected communities, operational-level grievance mechanisms that are effective in terms of process and remedial outcomes;

(e) Adopt a gender lens to discharge their responsibilities under pillars II and III and embed access to effective remedies in their policy commitments and human rights due diligence processes;

(f) Cooperate in good faith with all legitimate processes aimed at providing effective remedies for business-related human rights abuses and implement remedial orders of such bodies;

(g) Take proactive measures to prevent or mitigate those adverse human rights impacts that may result in irremediable harm;

(h) **Support States' efforts and encourage States to safeguard civil society organizations and human rights defenders from victimization for seeking remedies.**

88. **The Working Group recommends that civil society organizations and human rights defenders:**

(a) **Continue to play the role of "justice enablers" in the event of business-related human rights abuses, including by empowering affected individuals and communities and addressing current power imbalances;**

(b) **Highlight to States and businesses the diverse experiences and expectations of vulnerable or marginalized groups concerning access to effective remedies;**

(c) **Advocate legal and policy reforms that States should initiate to remove barriers to access to effective judicial and non-judicial remedies;**

(d) **Forge national coalitions and global networks to share information about the effectiveness of remedies and strategies concerning corporate accountability.**